Supreme Court, U.S.
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No. 96-1352

In The
Supreme Court of the United States

October Term, 1996

THEODORE ROBERT WILLOUGHBY

Petitioner

vs.

POTOMAC ELECTRIC POWER COMPANY

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF TO BRIEF FOR RESPONDENT IN OPPOSITION

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The Respondent ("PEPCO") seeks to rewrite the question presented by the Petitioner by eliminating its predicate: "Does a federal district court abuse its discretion when it denies a plaintiff leave to amend his complaint . . . , *where the amendments state a claim for relief under Title VII, the defendant has consented to these amendments, and the sole basis for the court's conclusion that the plaintiff's Title VII claim would be futile is its sua sponte application of summary judgment proceedings without providing the plaintiff with any warning to produce his evidence?*" [*Emphasis added.*] [Petition for Writ of Certiorari p i] But in its attempt to reshape this question, PEPCO misrepresents the record below and the holdings of other federal courts.

PEPCO now proclaims that it has always opposed the Petitioner's proposed Title VII amendment. [Brief for Respondent, pp 3, 7-8] This falsehood is exposed by PEPCO's own words filed in response to the Petitioner's motion for leave to amend his complaint. [App 74a-77a] PEPCO's response recognized that the correct test for adjudicating the amendment motion was legal sufficiency, not the summary judgment procedures that it now urges are "settled standards" under Rule 15. Based on the correct test, PEPCO opposed leave to add the proposed count under the D.C. Human Rights Act, but consented to the new counts under 42 U.S.C. § 1981 and Title VII:

> This Count [pleading a violation of the D.C. Human Rights Act] . . . *would not survive a motion to dismiss,* however, because it is time-barred. It would therefore be futile to add this Count, and Willoughby should not be permitted to amend his Complaint to add this new cause of action.

* * * *

> Counts Six and Seven of the proposed Amended Complaint seek to assert causes of action under Section 1981 and Title VII for alleged race discrimination. . . . Nevertheless, *because the proposed amendment to assert Section 1981 and Title VII claims would on its face apparently survive a motion to dismiss, PEPCO does not challenge it at this time.* [*Emphasis added.*] [App 75a-77a]

PEPCO inaccurately claims that the summary judgment record shows that the new discrimination counts were unprovable because the Petitioner's discharge "was based on his improper questioning of plaintiffs in the class action lawsuit . . . and on evidence that he made highly improper comments about his sexual relations." [Brief for Respondent p 10] But the only documents that reflect the basis for his discharge were hearsay accounts of conversations that had purportedly occurred years before. [Joint Appendix filed in Court of Appeals (referred to as "J.A.") 317-318, 368-369] The court's order staying discovery had blocked the depositions of the reported sources of these accusations and the PEPCO employees who had fired the Petitioner. [J.A. 512] Yet every such accusation was rebutted in the Petitioner's affidavit, the only relevant statement made under oath. [J.A. 238 ¶ 29] PEPCO's awareness of the falseness of these accusations was revealed in its positive evaluations of the Petitioner [J.A. 9 & 24, ¶s 6], and by its repeated denials of the discrimination charges made by the same individuals during the class action suit. [J.A. 11 & 25, ¶s 11; J.A. 64-65, ¶ E; Willoughby ex O & P filed September 12, 1994]. [1]

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1 The Petitioner's affidavit also shows that the class plaintiffs made these same kinds of accusations against black and white supervisors. [J.A. 234-235 ¶ 17, 239 ¶ 30]

The record does not contain other evidence to support the new federal discrimination counts because PEPCO had already consented to these amendments, the new averments were unrelated to the elements challenged by PEPCO's summary judgment motion, and the district court never provided any warning that it expected the plaintiff to provide such evidence.[2] Although PEPCO now argues that the amendments "arose out of essentially the same factual allegations concerning his discharge" [Brief for Respondent p 8], PEPCO's own response to the Petitioner's motion for leave to amend shows why these new counts were unrelated:

> An amendment relates back to the date of the original pleading only when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Here, the original Complaint made no reference whatsoever to discrimination or discriminatory discharge, and the new cause of action Willoughby seeks to assert does not relate back to that original Complaint. [*Citations omitted. Underlining in original.* App 76a fn 1]

PEPCO stressed that the new counts were unaffected by its summary judgment motion: "None of the proposed amendments has any bearing whatsoever on PEPCO's summary judgment motion." [App 77a]

2The Petitioner did not appeal the district court's refusal to allow his amendment action under 42 U.S.C. § 1981 because its ruling was based on legal insufficiency, not a sua sponte application of summary judgment procedures like the court applied to the Title VII cause of action. [App 21a-24a]

PEPCO's distortions of the record are amplified by its selective parsings of other appellate decisions. None of the cases cited by PEPCO support its argument that a court may refuse leave to amend based only on a sua sponte application of summary judgment standards, especially where the adverse party has provided consent to the amendment. Almost all involved proceedings where a summary judgment record was fully developed as to both the original and the proposed pleadings, and where futility was coupled with at least one other ground to deny the motion for leave to amend. *See Shafer v. Preston Mem. Hosp. Corp.*, ___ F.3d___, 1997 WL 788220 (4th Cir., 1997) (Denial of new claim based on pendant jurisidiction was proper where federal claim was dismissed, and undisputed facts showed that new claim was futile.); *Executive Leasing Corp. v. Banco Popular de Puerto Rico,* 48 F.32 66, 70-71 (1st Cir.), *cert. denied* 116 S.Ct. 171 (1995) (Court dismissed new claims without prejudice filed after five years of litigation.); *Estate of Porter v. Illinois,* 36 F.3d 684, 689-690 (7th Cir., 1994) (Proposed new allegations failed to cure related deficiencies raised by summary judgment motion.); *Resolution Trust Corp. v. Gold,* 30 F.3d 251, 254 (1st Cir. 1994) (Amendments were properly denied where they were submitted "at the eleventh hour to fend off summary judgment."); *Williams v. Little Rock Mun. Water Works,* 21 F.3d 218, 224-226 (8th Cir., 1994) (Proposed amendment filed after discovery cut-off and less than three weeks before trial was prejudicial, and failed to cure deficiences in the plaintiff's case.); *Schlacter-Jones v. General Telephone,* 936 F.2d 435, 443 (9th Cir., 1991) (Court denied leave to amend due to late filing of the motion, futility, and likelihood that it would decline to exercise jurisdiction over the one potentially viable pendent claim.); *Health-Chem Corp. v. Baker,* 915 F.2d 805, 810 (2nd Cir., 1990) (Amendment did not cure original deficiency, and proposed joinder of new defendant was prejudicial.);*Wilson v. American Trans Air, Inc.*, 874 F.2d 386, 391-392 (7th Cir., 1989) (Futile amendment submitted in "eleventh hour bid to breathe new life" into litigation

properly denied.); *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 765-766 (9th Cir. 1986) (Fourth amendment filed after discovery cut-off denied where undisputed evidence showed that the new cause of action was futile.); *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 762, 665-668 (5th Cir.) (Motion to amend is denied where motion was filed after discovery cut-off, the amendment was prejudicial, and the new pleading was legally insufficient.), *cert. denied* 454 U.S. 1098 (1981); *Verhien v. South Bend Lathe, Inc .*, 598 F.2d 1061, 1063-1064 (7th Cir., 1979) (Motion for leave to amend filed after completion of discovery is denied where the plaintiff failed to allege sufficient facts to state a valid claim.).

This case presents no such developed record on the Petitioner's proposed Title VII cause of action. The summary judgment record was relevant primarily to those issues raised by PEPCO's challenge to the original commonlaw counts, and neither proved nor disproved race and sex discrimination. The Petitioner had promptly filed his single motion to amend upon receipt of EEOC's right to sue notice [App 79a-81a], not in an "eleventh hour" attempt to fend off the unrelated summary judgment motion. Only six weeks of discovery had occurred when he filed his proposed amendment, and the discovery cut-off date was still two and a half months away with no scheduled trial. [J.A. 48-49] With PEPCO's written consent to his proposed amendment, the Petitioner had no warning to come forward with additional evidence. This record provides this Court with an excellent opportunity to clarify *Foman v. Davis*, 371 U.S. 178 (1962), and to provide much-needed guidance under Rule 15.

Respectfully submitted,

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